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No. 82-574

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANCY L. STEVENSON and L. MARION GRESSETTE,
Appellants,

versus

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al., and RICHARD W. RILEY, Governor of the STATE OF SOUTH CAROLINA, et al., Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM OR DISMISS

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MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16.1(c) and (d) of the Rules of the Supreme Court of the United States, the appellees Richard W. Riley, Ramon Schwartz, Jr., Robert J. Sheheen, and James B. Ellisor move the Court to affirm the judgment of the three-judge United States District Court for the District of South Carolina, or, in the alternative, to dismiss the appeal on the grounds that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

QUESTION PRESENTED ON APPEAL

Whether a three-judge court properly followed the standards for congressional apportionment when it fashioned a plan based on population equality that crossed one county line in a state that has a constitutional provision expressing a preference for maintaining county lines?

OPINIONS BELOW

The orders of the three-judge United States District Court for the District of South Carolina are set forth in appellants' jurisdictional statement. See, Jurisdictional Statement, App. A, B, and C.

JURISDICTION

The jurisdiction requisites are adequately set forth in the appellants' jurisdictional statement. See, Jurisdictional Statement at 2-3.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of Article I, Section 2 and Section 2 of the Fourteenth Amendment of the United States Constitution and the provisions of Article VII, Section 9 and Article VII, Section 13 of the South Carolina Constitution of 1895 are set forth in appellants' jurisdictional statement. See, Jurisdictional Statement, App. 3-5.

STATEMENT OF CASE

Following the release of the 1980 census data, the South Carolina Senate and House unsuccessfully attempted to enact a new congressional redistricting plan. Several plans were passed by each House; however, no plan was enacted by both Houses of the General Assembly. The last plan passed by the House was a plan referred to as the 0.28 plan. This plan provided for low population variance and split one

portion of one county, Berkeley County.

After the passage of the 0.28 plan, the General Assembly was unable to agree on a plan and a three-judge court was convened pursuant to suits previously filed by the plaintiffs and others. Several proposed redistricting plans were submitted to the court, including the 0.28 plan.

On March 8, 1982, the district court issued an Order adopting the 0.28 plan as a court-ordered congressional redistricting plan. The 0.28 plan, however, was subsequently discarded in favor of a court-fashioned redistricting plan, the so-called 0.295 plan, which resulted from a redrawing on April 30, 1982, of the line that divided Berkeley County into both the First and Sixth Congressional Districts.

The court's original Order of March 8, 1982, discussed the issue of maintaining county lines and concluded that the 0.28

plan, on which the 0.295 plan was subsequently based, met the requirement of low population variance. It did so, the court observed, without radically rearranging the counties and by placing the people of only one small portion of a county into another district with others with whom they shared a community of interest. Jurisdictional Statement, App. at 27.

REASONS FOR GRANTING MOTION

The United States Supreme Court in Wesberry v. Sanders, 376 U.S. 1 (1964), held that Article I, Section 2 of the Constitution of the United States mandates equal representation for equal numbers of people. Consequently, in the enactment of a congressional districting plan,

> the State [must] make a good faith effort to achieve precise mathematical equality.... Unless population variances among congressional districts are shown to have resulted de-

> spite such effort, the State must justify each variance, no matter how small.... [The Constitution] permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown.

Kirkpatrick v. Priesler, 294 U.S. 526 at 530-531 (1969); see also, White v. Weiser, 412 U.S. 793 at 790-791 (1973).

The court in fashioning a redistricting plan is required to follow as much as possible the preferences and policies of the state because districting is primarily a legislative function. See, White v. Weiser, supra, at 795; see also, Shayer v. Kirkpatrick, 541 F. Supp. 922 at 932 (W.D. Mo. 1982); Doulin v. White, 528 F. Supp. 1323 at 1331 (E.D. Ark. 1982). The state's work on redistricting, legislative proposals and historical practices may all be reviewed in determining the state's policy. Shayer v. Kirkpatrick, supra,

at 932.

One policy consideration of the State of South Carolina was to observe, as much as feasible, county lines in the construction of congressional districts. Neither the House nor the Senate adopted any plan that either completely or in large measure did not follow county lines.

However, Article VII, Section 13 of the South Carolina Constitution of 1895 does not mandate that county boundaries can not be crossed by the General Assembly in establishing congressional districts. This provision provides that the General Assembly "may" arrange the counties into congressional districts. The use of the term "may" in South Carolina constitutional and statutory provisions has been held to be merely advisory or discretionary. State v. Wilson, 274 S.C. 352, 264 S.C. 2d 414, 416 (1980: Carolina Music Co. v. Query,

192 S.C. 308, 6 S.E. 2d 473, 498 (1939); State v. Reeves, 112 S.C. 383, 99 S.E. 841, 842 (1919). The term should be given the same meaning and interpretation in Article VII, Section 13. This construction is further supported by comparing Article VII, Section 13 with the use of the term "shall" in other provisions of the South Carolina Constitution; specifically Article III, Section 3 which establishes that there "shall" be one hundred and twenty-four State House members and with Article VII, Section 14 which provides that a county line "shall" not pass through incorporated cities and towns.

The courts have consistently held that the primary factor in congressional redistricting is population equality and other policy considerations and factors may be considered only if they do not appreciably affect population equality. White

v. Weiser, supra, at 795. This court has repeatedly held that it does

> ...not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. Kirkpatrick v. Preisler, supra, at 533-534.

See also, Wells v. Rockefeller, 394 U.S. 542 (1969); White v. Weiser, supra, at 791.

The three-judge court in this case in fashioning its 0.295 plan established a plan with low population variance that followed as much as possible the state's preference for maintaining county lines. In the court's plan only one county is split. The county boundaries of the remaining forty-five counties are maintained without sacrificing population equality.

This court, therefore, is not presented with a novel question by the cross-appeal of

the case. The court did incorporate applicable state policy considerations and fashioned a plan that divided only one small portion of one county while still maintaining population equality.[1] No case has held in congressional redistricting that county lines must be preserved to the detriment of population equality. The cases cited by the cross-appellant as being in direct conflict with the district court's decision are not in opposition to that decision.

In Wisconsin State AFL-CIO v. Elections Board, 543 F. Supp. 630 (E.D. Wis. 1982), a

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[1]The court not only utilized the policy considerations of preserving county lines but applied additional policy considerations not at issue in this cross-appeal, i.e., there is no retrogression in black voting strength, incumbents are not pitted against each other, the districts are continguous and compact, and community of interest is maintained.

suit was brought concerning state legislative reapportionment. The court found that even though Wisconsin had a state constitutional provision providing that the districts should be bounded by "county, precinct, town or ward lines" the maintaining of the integrity of the county lines was of secondary importance to the requirements of population equality. Wisconsin, supra, at 634-635.

Boyer v. Gardner, 540 F. Supp. 624 (D.N.H. 1982) is another state legislative reapportionment case. The court found that maintaining county, city and town boundaries to be a legitimate policy reason for finding that a state reapportionment plan of 13.74 percent variation was valid.

State legislative reapportionment plans, of course, do not have to meet the more stringent requirements of congressional districting. Chapman v. Meier, 420

U.S. 1, 23 (1975); Gaffney v. Cummings, 412 U.S. 735, 741-742 (1973); Wisconsin, supra, at 633.

The cases of Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982) and O'Sullivan v. Brier, 540 F. Supp. 1200 (D. Kan. 1982) are both congressional redistricting cases. In Jordan the court listed the primary state policy considerations and attempted to incorporate these considerations into a plan. Jordan, supra, at 1143-1144. Preserving county lines was not listed as one of the policy considerations. Moreover, the plan which the court approved split two counties. The court in O'Sullivan set out not to approve a plan splitting county lines; however, the court stated at the outset that such a plan would be possible only "if the resulting district realignment would not result in unconstitutional population deviations." (Emphasis added). O'Sullivan,

supra, at 1204.

These cases are cited by cross-appellants for the proposition that these courts did consider and utilize state policy considerations in providing redistricting plans. However, the three-judge court in the present case also utilized state policy considerations in fashioning its plan and adhered as nearly as possible to those policies without violating federal constitution provisions.

The three-judge court specifically listed state policy considerations as factors in deciding on an acceptable plan. The court placed special emphasis on maintaining county lines. Jurisdictional Statement, App. A at 22-25. The court cited the South Carolina constitutional provisions at issue here and stated that:

> [t]he provision is permissive, not mandatory, though the Senate defendants would find in it an

> implicit prohibition against subdivision of any county. With respect to that, one may say that there should be little doubt the members of the constitutional convention of 1895 did not forsee the Supreme Court's holding in Wesberry v. Sanders and the problems that would be engendered by required decennial redistricting. Probably no one had thought of the possibility of a division of a county between two congressional districts, and, if one had thought of it, the answer probably would have been that it should not be done unless there was good reason for it. Jurisdictional Statement, App. A, at 22.

The court then considered and rejected the 0.73 and 0.98 plans because although they kept all county lines intact they had substantially higher population variances than the 0.28 plan, moved a substantial amount of counties from the previous congressional districts and split counties with community of interest. The court further found the 0.98 plan was not even compact. Jurisdictional Statement, App. A, at 25.

Far from not considering state policies and preferences, the court tried to balance these interests with the overriding consideration of population equality. The court repeatedly expressed concern about the state preference for maintaining county lines.[2] However, finding the other submitted plans unacceptable, the court concluded that the 0.28 plan, later fashioned by the court into a 0.295 plan, did the best to accommodate both state and federal considerations. The court did not violate the State constitutional provision of Article VII, Section 13 in adopting its 0.295 plan in that the South Carolina Constitution does not mandate that county units must be utilized. In fact, in crossing the one county line it did cross, the court followed

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[2]The court expressly rejected a Plaintiff proposed 0.0656 plan because it separated large areas of community of interest and cut across four county lines. Jurisdictional Statement, App. A at 26.

established precedent of the South Carolina Legislature in that the 1974 South Carolina State House reapportionment plan itself does not utilize county lines but instead cuts across several county lines to establish House districts.[3] And, of course, the House passed congressional districting plan of 0.28 crossed one county line. Likewise, Article VII, Section 9 was not applied to the State House reapportionment plan by the General Assembly.

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[3]Further evidence of a willingness to divide counties is indicated by the actions of the South Carolina Senate during the 1973 apportionment of the South Carolina House. In the initial stages of the 1973 special session, the House gave final reading to and sent to the Senate Bill H. 2287, a multi-member district plan which preserved county lines. See, S.C. House Journal No. 9 at 315 (September 27, 1973). The Senate thereafter amended the House passed plan by adopting a single-member district plan. S.C. Senate Journal No. 19 at 178 (October 11, 1973). Twenty-one (21) of the one hundred twenty-four (124) House districts crossed county lines. See, e.g., Exhibit A, Sub-District 5A, S.C. Senate Journal No. 19 at 140 (October 11, 1973).

Appellants assert that if the plans are analyzed by voting age population the district court's plan does not differ significantly from other plans which do not cross county lines.

In Wesberry v. Sanders, supra, the Supreme Court concluded:

> The history of the Constitution, particularly that relating to the adoption of Article 1, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election,...it was population which was to be the basis of the House of Representatives. Wesberry at 375-376.

Accordingly, the court in that case and in Kirkpatrick v. Preisler, supra, and White v. Weiser, supra, evaluated the various redistricting plans using the total population of the districts, not voting age population. See also Gaffney v. Cummings,

supra, at 746-754.[4]

Cross-appellants further cite the Gaffney, supra, case as the proper balance between mathematical equality between districts and other legitimate considerations. Appellants argument disregards the fact that Gaffney concerns a state legislature apportionment plan. As previously noted there is a substantial difference in the requirements and case law in congressional districting as opposed to state legislature apportionment. Motion, supra at 11-12. Precise mathematical equality is required under the provisions of Article 1, § 2 of the United States Constitution for

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[4]Equality by voting age population would be a very elusive principle on which to base redistricting in that there is no way to equally divide a state by voting age population as obviously one district may have a larger percent of registered voters than another. Additionally, South Carolina has a population of 3,119,208 of which only 2,179,840 are registered voters.

congressional redistricting; however, it is not required for state legislature reapportionment as this process is governed by the Equal Protection Clause of the Fourteenth Amendment. Shayer v. Kirkpatrick, supra, at 928, footnote 3; Wesberry, supra, at 7-8; White v. Regester, 412 U.S. 755, 763 (1973).

> It is plain from Mahan v. Howell, [cite omitted] and Gaffney v. Cummings [cite omitted] that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. Kirkpatrick v. Preisler did not dilute the tolerances contemplated by Reynolds v. Sims with respect to state districting and we did not hold in Swann v. Adams [cite omitted] or Kilgarlin v. Hill [cite omitted] or later in Mahan v. Howell,...that any deviations from absolute equality, however, small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in Gaffney v. Cummings, we do not consider relatively minor population deviations among state legislature districts to substantially dilute the weight of individual voters

> in the larger districts so as to deprive individuals in these districts of fair and effective representation. White, supra, at 763-764.

Finally, the court expressly authorized the General Assembly to enact, at any time, its own constitutional plan. Jurisdictional Statement, App. A, at 28 and 30. Therefore, the General Assembly is still free to devise and enact a plan that meets all federal and state requirements and policies including maintaining county lines.

CONCLUSION

The aforementioned appellees respectfully submit that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and, therefore, respectfully move this Court to affirm the judgment entered in the cause by the three-judge District Court for the District of South Carolina or, in the alternative, to dismiss the appeal. In any event, no injunction should issue enjoining the upcoming congressional elections.

Respectfully submitted,

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The Senate resumed consideration of the Bill.

The question being the second reading of the Bill.

Messrs. J. VERNE SMITH, TAYLOR, THOMAS E. SMITH, JR., McMILLAN, HARTNETT and GARRETT proposed the following amendment:

Amend the Bill, as and if amended, by striking all after the enacting words and inserting in lieu the following:

"Section 1. Section 30-1 of the 1962 Code is amended to read as follows:

'Section 30-1. Effective with the general election of 1974, the State of South Carolina is divided into one hundred twenty-four election districts for the election of members to the House of Representatives with one member to be elected from each district as hereinafter described:

District Number and Composition		*Number of Representatives*	*Population of District*	*Variation per Representative*
1	Oconee County	2	40,728	—2.52
Subdistrict 1A	Oconee County Oakway Division, Seneca N. Division, Seneca S. Division, Seneca Division, Part Walhalla S. Division (E.D.'s 16, 17)	(1)	(20,838)	(—0.25)
Subdistrict 1B	Oconee County Part Walhalla S. Division (E.D. 15), Long Creek Division, Mountain Rest Division, Salem Division, Walhalla Division, Walhalla North Division, Westminster Division	(1)	(19,890)	(—4.73)

EXHIBIT A

District Number and Composition		*Number of Representatives*	*Population of District*	*Variation per Representative*
Subdistrict 5A	McCormick County Greenwood County Troy Division, Kirksey Division, Greenwood W. Division, Greenwood E. Division, Part Ninety-Six Division (E.D. 49), Part Hodges Division (E.D. 7)	(1)	(21,699)	(+3.87)
Subdistrict 5B	Greenwood County Part Greenwood N. Division (E.D. 9), Part Greenwood Division (less Part Tract 9501.04, Blocks 101-127, 201-221)	(1)	(21,189)	(+1.43)
Subdistrict 5C	Greenwood County Part Ninety-six Division (less E.D. 49), Part Hodges Division (less E. D. 7), Greenwood N. Division, (less E.D. 9), Laurens County, Princeton Division, Cross Hill Division, Part Greenwood Division (Part Tract 9501.04, Blocks 101, 102-127, 201-221)	(1)	(21,606)	(+3.42)
Subdistrict 5D	Laurens County Part Laurens Rural Division (less E.D. 49), Clinton Division, Joanna Division	(1)	(22,138)	(+5.97)